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November 15, 2002

Ms. Charlotte R. Mooney  
Generator & Recycling Branch (5301W)  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Re: MIRC's Position on Definition of Solid Waste

Dear Charlotte:

As a follow-up to our meetings earlier this summer, attached for your review and consideration is a position paper summarizing the Metals Industries Recycling Coalition's ("MIRC's") position on revising the Resource Conservation and Recovery Act ("RCRA") Definition of Solid Waste ("DSW") consistent with *Association of Battery Recyclers v. EPA* ("ABR"), 208 F.3d 1047 (D.C. Cir. 2000).

MIRC represents the interests of a significant percentage of the U.S. metals industry, and has long been involved in the DSW issue. As we have discussed, and which is further described in the paper, MIRC supports the DSW reform efforts but believes that the Environmental Protection Agency's stated focus is far too narrow. Instead of limiting relief only to materials recycled in a "continuous industrial process within the generating industry," a better approach, and one more consistent with ABR, is to exempt from RCRA all secondary materials that are "legitimately" recycled. We have outlined in the paper legitimacy criteria that MIRC supports.

Again, we appreciate your efforts and look forward to working with you on this issue. Please call me if you have questions, comments, or need additional information.

Sincerely,



Chet M. Thompson

Enclosures

cc: Honorable Marinanne Horinko, Assistant Administrator, OSWER  
~~Ms. Ingrid Rosencrantz~~, Generator & Recycling Branch, HWID, OSW  
Metals Industry Recycling Coalition members

**METALS INDUSTRIES RECYCLING COALITION**

**RCRA DEFINITION OF SOLID WASTE**

November 2002

**I. INTRODUCTION**

On behalf of the Metals Industries Recycling Coalition ("MIRC"), this position paper responds to the Environmental Protection Agency's ("EPA's") call for comment on its stated intention of revising the Resource Conservation and Recovery Act ("RCRA") definition of "solid waste" in the wake of the United States Court of Appeals ruling in *Association of Battery Recyclers v. EPA* ("ABR"), 208 F.3d 1047 (DC Cir. 2000). The MIRC supports EPA's efforts to define its RCRA authority and to remove regulatory disincentives to environmentally-sound recycling. For the reasons discussed below, however, MIRC believes that limiting relief to materials that are recycled in a "continuous industrial process within the generating industry" is inconsistent with *ABR*, as well as other D.C. Circuit cases, and would provide only limited relief to the metals industry, the United States' largest recycler. If EPA is committed to increasing environmentally beneficial recycling, it should exclude from RCRA regulation all materials that are "legitimately" recycled.

MIRC is an ad hoc coalition of metals companies and trade associations. Its membership includes representatives of a wide cross section of the metals industry, including iron and steel, copper and brass, nickel and nickel alloys, nonferrous foundries, and other metals recyclers. MIRC was formed in the early 1990s specifically to work with EPA's Definition of Solid Waste Task Force and to provide EPA with the metals industry's perspective on RCRA recycling and ways to encourage environmentally-beneficial recycling.

**II. LIMITING RELIEF TO MATERIALS THAT ARE RECYCLED IN A "CONTINUOUS INDUSTRIAL PROCESS WITHIN THE GENERATING INDUSTRY" IS INCONSISTENT WITH D.C. CIRCUIT CASE LAW AND WOULD NOT FURTHER EPA'S GOAL OF FOSTERING INCREASED REUSE AND RECYCLING**

In its March 13, 2002 *Federal Register* notice, EPA announced its intention of providing RCRA relief to materials that remain in use in a "continuous industrial process." Subsequently, EPA narrowed its focus even further, publicly stating its intention of limiting relief to materials recycled in a "continuous industrial process within the generating industry." EPA has since solicited comments on what that phrase means and on how "generating industry" should be defined. In particular, EPA has requested comments on whether "generating industry" should be limited to two, three, or four digits under the North American Industry Classification System ("NAICS").

MIRC does not support exempting from RCRA only materials that are recycled in "continuous industrial processes within the generating industry" or defining "generating industry" by one or more NAICS codes. EPA's focus should be on the legitimacy of the recycling activity, not on the relationship between generators and recyclers as defined by NAICS codes. Exempting all legitimate recycling would put "recovery" back into the Resource Conservation and Recovery Act.

**A. Case Law Does Not Support Basing RCRA Jurisdiction on Whether Material Is Recycled in a Continuous Industrial Process Within the Generating Industry**

EPA's preliminary decision to limit any future RCRA exemption to materials recycled or used in a continuous industrial process within the generating industry is based on the Agency's interpretation of the D.C. Circuit's holding in *ABR* and its earlier decisions in *American Mining Congress v. EPA* ("AMC I"),<sup>1</sup> *American Petroleum Institute v. EPA* ("API"),<sup>2</sup> and *American Mining Congress v. EPA* ("AMC II").<sup>3</sup> Although these cases, particularly *AMC I*, dealt with whether EPA has RCRA jurisdiction over materials recycled in "continuous industrial process" within the "generating industry," the holdings of those cases were not so limited. Rather, the thrust of the cases is that Congress limited EPA's RCRA authority to materials that are "discarded" by being disposed of, abandoned, or thrown away, and, as the *ABR* court specifically stated, materials destined for recycling are "plainly not in that category."<sup>4</sup>

The *AMC I* case was the first time the D.C. Circuit had an opportunity to look at EPA's RCRA jurisdiction over recyclable materials. At issue in *AMC I* was whether EPA has RCRA authority to regulate materials reused or recycled onsite within an industry's ongoing production process. Answering this question in the negative, the Court held that RCRA "reveals clear Congressional intent to extend EPA's authority only to materials that are truly discarded, disposed of, thrown away, or abandoned." The Court noted that the intent of RCRA was to help states deal with solid waste disposal by encouraging alternatives to disposal, such as recycling, and that to fulfill these purposes, EPA need not regulate materials that are recycled and reused in an ongoing manufacturing or industrial process because they "have not yet become part of the waste disposal problem; rather they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself."

EPA apparently believes that *AMC I*'s holding applied only to materials immediately recycled in a continuous process within the generating industry itself. Interpreting *AMC I* so

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<sup>1</sup> 824 F.2d 1177 (D.C. Cir. 1987).

<sup>2</sup> 906 F.2d 729 (D.C. Cir. 1990).

<sup>3</sup> 907 F.2d 1179 (D.C. Cir. 1990).

<sup>4</sup> *ABR*, 208 F.3d at 1053.

narrowly is wrong. The *AMC I* Court limited its holding to materials being recycled in a continuous industrial process by the generating industry not because those facts were essential to its decision, but rather because those were the facts at issue in the case.<sup>5</sup> The Court's reasoning was both broader and more simplistic than EPA makes it out to be: materials that are recycled are not discarded, and, hence, are beyond EPA's RCRA authority. The *ABR* decision makes that abundantly clear.

EPA has also cited *API* as further justification as to why relief must be limited to materials recycled as part of a continuous process in the generating industry itself. Again, EPA reads the case too narrowly. In relevant part, at issue in *API* was whether EPA correctly concluded that, based on *AMC I*, it had "no choice" but to disclaim RCRA authority over slag residues generated from the offsite reclamation of RCRA hazardous waste K061. The *API* Court held that "[b]ecause the EPA mistakenly concluded that our case law [*AMC I*] left it no discretion to interpret the relevant statutory provisions, we are constrained to remand" the rule.<sup>6</sup> Importantly, the Court remanded the rule not because of what EPA concluded, *i.e.*, that K061 is no longer discarded when it arrives at a facility for metals reclamation, but because of the justification it gave for arriving at its conclusion, *i.e.*, that *AMC I* left it no choice. The Court noted that its decision may have been different had EPA justified its decision not to regulate K061 on other grounds. The *API* Court used the terminology that EPA clings to, *i.e.*, "ongoing manufacturing or industrial process" within the "generating industry." But, again, not because it was paramount to its decision, but because it was quoting *AMC I*. *API*'s message is the same as *AMC I*'s, namely, EPA's RCRA authority necessarily extends only to materials that have been discarded by being disposed of, abandoned, or thrown away, and not to recycled materials.

*AMC II*, the next in the line of D.C. Circuit cases on this topic, remained loyal to *AMC I*'s core message that EPA's RCRA jurisdiction extends only to "discarded" materials. At issue in *AMC II* was whether EPA unlawfully asserted RCRA jurisdiction over three mining waste streams that were typically managed in surface impoundments and that were potentially recycled in the future. EPA argued that because the materials were stored in surface impoundments from where they could leach and contaminate the environment, they constituted "discarded" materials subject to RCRA regulation. Petitioners disagreed, arguing that *AMC I* precluded EPA from asserting RCRA jurisdiction over the materials since they may be recycled. In siding with EPA, the Court noted that the "potential reuse" of a material is not enough under *AMC I* to prevent EPA from classifying a material as "discarded." The Court went on to conclude that EPA's determination that the materials are "not part of ongoing industrial processes" and are "part of the waste disposal problem" was reasonable and consistent with the purposes of RCRA. The

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<sup>5</sup> Specifically, the petroleum industry argued that EPA's definition of solid waste would improperly regulate various hydrocarbon materials recycled back into the refining process. Similarly, the mining industry argued that EPA's definition of solid waste would impermissibly regulate reprocessed ore and recycled metal-bearing dusts.

<sup>6</sup> *API*, 906 F.2d at 741.

*AMC II* Court did not contract *AMC I*. Rather, it simply found that the materials at issue had indeed been discarded and that potential future recycling was not enough to escape RCRA. Had the facts been different, and the materials routinely recycled, the Court's holding likely would have mirrored *AMC I*.

The Court's most recent holding in *ABR* reiterates the law established by its earlier cases: materials that are not "disposed of, abandoned, or thrown away" are not "solid wastes," and, therefore, are not subject to RCRA. By focusing so narrowly on the phraseology "continuous industrial process" with the "generating industry" and insisting that any revisions to RCRA fit neatly within such a rubric, EPA is falling into the same trap that *ABR* warned against, namely, to parse its opinions as "though we were dealing with a statute." It is also missing the broader findings of the case law and the opportunity to fix the DSW issue once and for all.

As discussed in more detail below, MIRC believes that a better approach, one that would be consistent with the above case law, would be to exclude from RCRA all materials that are "legitimately" recycled, regardless of the relationship between the generator and the recycler.

**B. A NAICS-Based Approach for Defining EPA's RCRA Jurisdiction Would Significantly Limit Metals Recycling**

MIRC also opposes EPA's proposal to use the North American Industry Classification System ("NAICS") to define "generating industry" for RCRA jurisdictional purposes. First, as discussed above, to promote recycling and to be consistent with the D.C. Circuit Court's mandate, EPA should concentrate on whether and how a material is recycled, as opposed to limiting itself to the narrow notion of what constitutes a "continuous industrial process within the generating industry." Second, a NAICS-based approach, particularly one based on three or more digits, is ill suited for the complex nature of metals recycling.

As elements, metals are infinitely persistent and can always be recycled. Moreover, unlike other types of recycling, metals recycling spans and crosses over all six NAICS codes. For example, some metals recycling, particularly in the mining industry, occur onsite and thus within identical NAICS codes. Other metal-bearing materials pass from primary metal producers to secondary metal producers, and, thus, are recycled within the same two-digit or three-digit NAICS codes. Other forms of metal recycling, however, do not even share two digits (e.g., metal catalyst from petroleum industry recycled by metals industry) and, in some cases, not even one NAICS digit (e.g., metal-bearing materials generated within the mining industry and recycled within the secondary metals industry).<sup>7</sup> Consequently, summarily concluding that only those that share at least three NAICS digits are within the same "generating industry" and hence outside of RCRA, while all others are RCRA regulated, would have major ramifications for the

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<sup>7</sup> The complex web of metals recycling is best depicted in a diagram (commonly referred to as the "spaghetti" diagram) that was included in a study of metals recycling conducted by Dr. Robert A. Frosch of Harvard University. See Attachment 1.

metals industry. It would also lead to the absurd result that the recycling of virtually identical materials by the same recycler would be regulated differently based only on the NAICS code from which they were generated.

If a metal-bearing material is being recycled, it is not being discarded; nor should be treated as such. Provided materials have not become part of the waste disposal problem by being abandoned or disposed of, why should it matter whether the generator and recycler share two, three, or four NAICS codes?

### **III. ALL LEGITIMATE RECYCLING SHOULD BE OUTSIDE OF EPA'S RCRA JURISDICTION**

To be consistent with the D.C. Circuit's case law, all materials that are "legitimately" recycled should be outside of EPA's RCRA subtitle C regulation. Legitimately recycled materials, per *ABR*, are not "discarded" and thus cannot be "solid or hazardous" wastes. In the context of metals recycling, MIRC offers the following criteria for determining whether recycling is legitimate:

1. the recycling facility must produce a material suitable for return to commerce or for use by the recycler, either as an ultimate product or as a feed material for an industrial process;
2. the recyclable material must meet process specifications established by the recycler relating to one or more of the products of the recycling process;
3. the material cannot be "speculatively accumulated";
4. the recyclable material must be handled in a manner to minimize loss of that material consistent with industry practices;
5. the recycler must maintain adequate business records relating to the receipt and processing of the recyclable material and the sale or use of the recycled product or feedstock; and
6. the product manufactured from the recyclable material must meet specifications established for its use as a process feedstock or in commerce as a product.

Again, the purpose of these criteria would be to establish that the recyclable material has not been "discarded" and is being beneficially recycled. Materials and recycling activities that cannot meet the above criteria would presumptively be considered "waste-like" and subject to RCRA subtitle C requirements.

#### IV. CONCLUSION

MIRC applauds EPA for revisiting the "definition of solid waste" issue. However, EPA's stated approach of narrowly interpreting *ABR* to exclude from RCRA subtitle C jurisdiction only those materials that are recycled in a "continuous industrial process within the generating industry" is misplaced and will not achieve EPA's goal of encouraging environmentally-sound recycling. EPA should instead focus on *ABR*'s broader meaning, *i.e.*, (1) a material is not subject to RCRA unless it is discarded by being abandoned or thrown away; and (2) a material that is recycled is not discarded. EPA can fulfill the court's mandate, promote recycling, and adequately protect the environment by taking the position that all materials that are legitimately recycled, as defined above, are outside of EPA's RCRA subtitle C jurisdiction.

MIRC appreciates the opportunity to provide these comments and looks forward to working with EPA on this extremely important topic. If you have questions or comments, please contact Chet Thompson (202) 342-8815 or John Wittenborn (202) 342-8514.

Attachment

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July 12, 2002

Tracy Mattson  
Program Analyst  
U.S. Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

Re: **Definition of Solid Waste**

Dear Tracy:

Thanks for the heads up regarding next week's internal Environmental Protection Agency ("EPA") meetings regarding the Definition of Solid Waste. As we discussed, members of the Metals Industries Recycling Coalition ("MIRC") continue to believe that to promote recycling and to be consistent with the D.C. Circuit Court's mandate, EPA should think broadly and focus on how a material is recycled, as opposed to limiting itself to the short-sighted notion of what constitutes a "continuous industrial process within the generating industry." It should not matter jurisdictionally whether a metal-bearing material is generated and recycled within the same North American Industry Classification System ("NAICS") or whether it is generated in one and recycled in another, particularly when metals are concerned. All that should matter is that the material is being legitimately recycled and not discarded.

Because of the relatively short turnaround time, we were not able to prepare a comprehensive, detailed response. Instead, I have enclosed two documents. The first is the somewhat famous "spaghetti diagram." The diagram, which was prepared by Robert A. Frosch of Harvard University, depicts the complex flow of metals within the metals processing industry. The diagram does not include NAICS codes, but it should be obvious from the diagram what a significant impact a narrow definition of "generating industry" would have on the metals industry.

Second, I have enclosed some brief examples of metals recycling that demonstrate the fundamental flaws of a NAICS-based approach. Some are from entirely within the metals industry, and others involve multiple industries. The MIRC plans on developing additional examples over the coming weeks, which we will be glad to share with you.

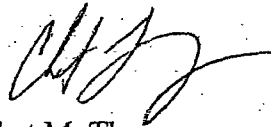


Collier Shannon Scott

Tracy Mattson  
July 12, 2002  
Page 2

Again, thanks in advance for your help on this matter. Please let me know how else we can be of assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Chet M. Thompson', with a stylized, flowing script.

Chet M. Thompson

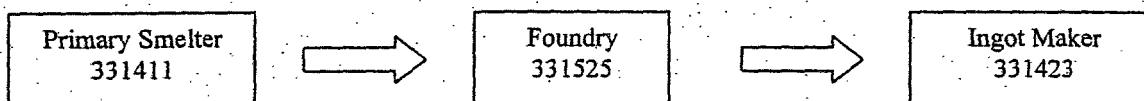
Enclosures

cc: Metals Industries Recycling Coalition

## RECYCLING EXAMPLES

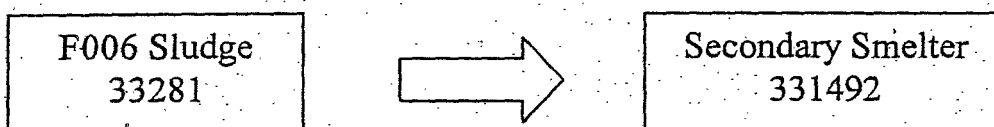
### Example #1 Copper Recycling

In this example, slag, skimmings, and drosses from a primary copper smelter are recycled in a secondary copper foundry, whose secondary materials are, in turn, recycled by a secondary copper ingot maker. As you can see from the diagram, a three-digit NAICS system would work in this scenario, but not a four-digit one.



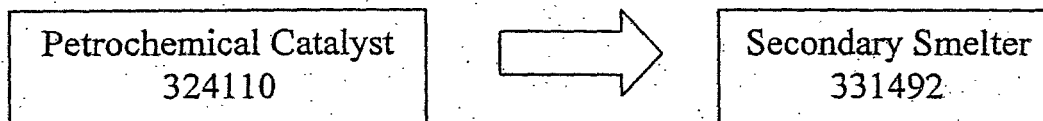
### Example #2 F006 Recycling

In this example, F006 sludges from metal plater are recycled by secondary nonferrous smelter. A two-digit NAICS works but anything more specific would not.



### Example #3 Spent Catalyst Recycling

In this example, spent metal catalyst from the petrochemical industry is recycled to recover the nickel values in a secondary nonferrous smelter. Here, not even a two-digit program would work. The focus should be on the recycling operation, not NAICS.



### Example #4 Chromium Dichromate Recycling

Spent chromium pigment recycled by nonferrous smelter. Here again, even a two digit regime would not work.



Figure 2. The spaghetti diagram indicates the flows of metals among a sample of metals processors in New England.

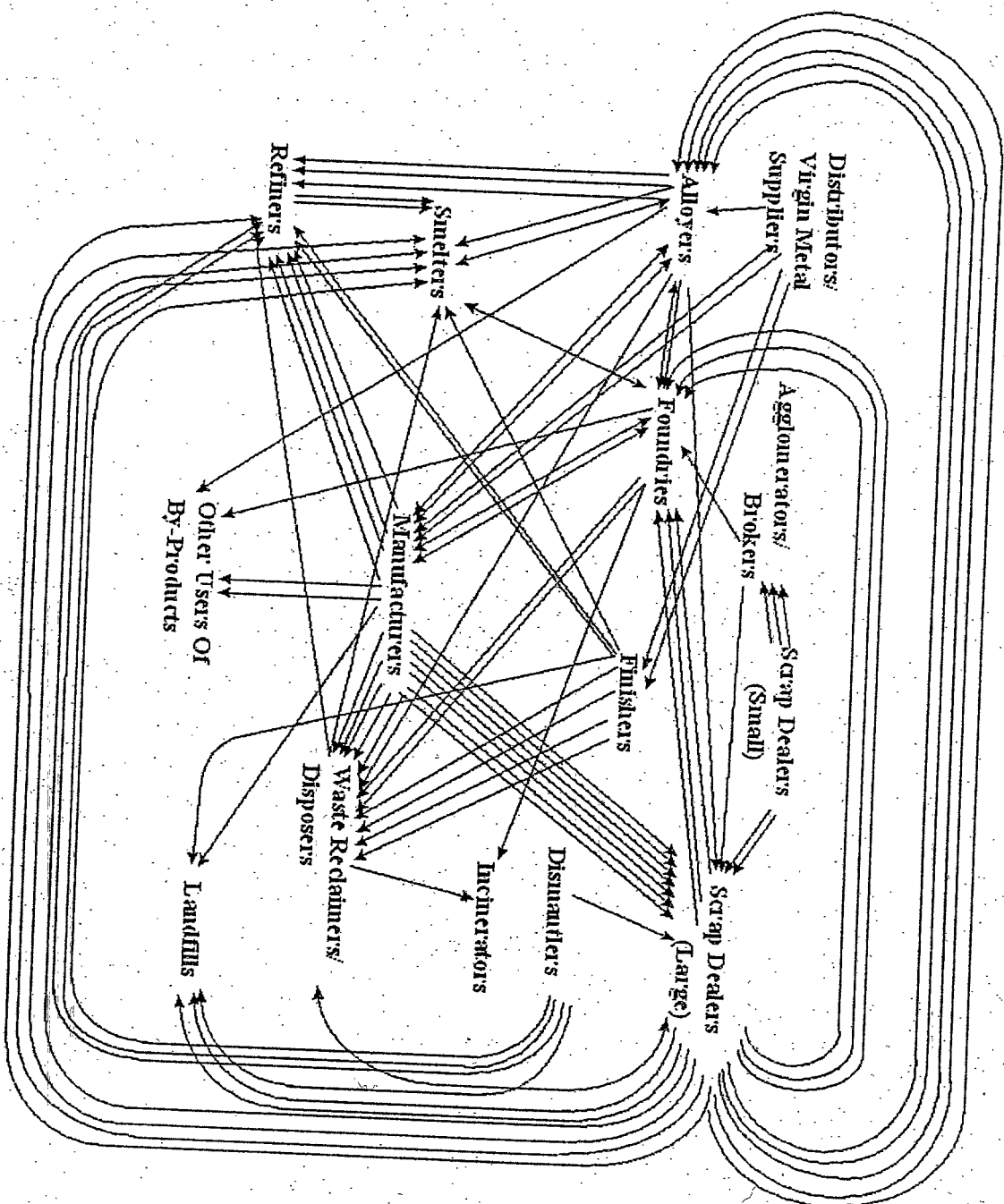


Figure 2. The spaghetti diagram indicates the flows of metals among a sample of metals processors in New England. The arrows indicate the direction of the flow, while the number of lines indicate the magnitude. Note the presence of waste reclaimers, dismantlers, and scrap dealers that allow for system closure. Source: Frosch, R.A., Clark, W.C., Crawford, J., Tschang, T.T., and Weber, A., 1996, The Industrial Ecology of Metals: A reconnaissance, From a talk delivered at the Royal Society/Royal Academy of Engineering meeting, May 29-30, London, U.K.